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No. 96

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

CANTON RAILROAD COMPANY, *Appellant*

vs.

JOSEPH H. A. ROGAN, OWEN E. HITCHINS AND WILLIAM W. TRAVERS, CONSTITUTING THE STATE TAX COMMISSION OF MARYLAND,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF FOR APPELLANT

King Bros, Inc., Printers, 208 N. Calvert St., Baltimore, Md.

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OPINIONS BELOW

The opinion of the Court of Appeals of Maryland and the dissenting opinion of two judges thereof (R. 35-50) are reported in 73 A.2d 12.

JURISDICTION

The final decree of the Court of Appeals of Maryland was entered on April 19, 1950 (R. 44). Petition for appeal was presented to the Chief Judge of that court on May 24, 1950, and was allowed the same day (R. 3). The jurisdiction of

this Court is conferred by U.S.C. Title 28, Sec. 1257 (2). Probable jurisdiction was noted on October 9, 1950 (R.53).

STATUTE OF MARYLAND THE VALIDITY OF WHICH IS INVOLVED

The Maryland statute, the validity of which, as construed to impose a "franchise tax" upon Appellant's privilege to engage as a common carrier in the importing and exporting process, by handling and forwarding imports and exports in foreign commerce, and to measure the tax by the gross receipts derived from such commerce, was drawn in question as being repugnant to Article 1, Section 10, Clause 2 (Import-Export Clause) of the Constitution of the United States, and sustained by the decision and decree of the Court of Appeals of Maryland, is Article 81, Sections 94½ and 95 of the Annotated Code of Maryland (1943 Supp.). Article 81, Section 94½ is a codification of Laws of Maryland 1943, Chapter 488, Section 12, page 588. Article 81, Section 95 is a codification of Laws of Maryland 1922, Chapter 351, Section 1, pages 784 and 785, and Laws of Maryland 1941, Chapter 906, Section 6, page 1654.

Article 81, Sections 94½ and 95 of the Annotated Code of Maryland (1943 Supp.) reads, to the extent relevant, as follows:

> "94½. The phrases 'gross receipts', 'total receipts', 'gross earnings', 'total earnings' and 'all earnings', as used in Sections 95 to 100, inclusive, mean in the case of railroads and other public service corporations, the operating revenues thereof, without any deductions or credits of any kind whatsoever. When any public service corporation is engaged in more than one class of business and one or more classes thereof is business not subject to the gross receipts tax or subject thereto at different rates, the operating revenues of the class or classes of business subject to such tax at different rates shall be reported separately and taxed at the rate or rates applicable to such class or

classes of business. This section shall not be construed as implying that in the absence of this section the requirements of Sections 95 to 100, inclusive, could properly be otherwise construed.

"95. (a) A State tax as a franchise tax is hereby levied annaally for the year 1930 and subsequent years measured by the gross receipts for the preceding calendar year, of:

"(1) All domestic or foreign railroad companies whose roads are worked by steam, doing business in this State, at the following rates, to wit:

"One and one-quarter per centum on the first $1,000 per mile of gross earnings, or on the total earnings if they are less than $1,000 per mile; and

"Two per centum on all gross earnings above $1,000 and up to $2,000 per mile; and

"Two and one-half per centum on all earnings in excess of $2,000 per mile.

* * * * * *

"(b) If any such railroad company has part of its road in this State and part thereof in another State or States, such company shall return a statement of its gross receipts over its whole line of road, together with a statement of the whole length of its line and the length of its line in this State, and such company shall pay to the State, at the said rates hereinbefore prescribed upon such proportion of its gross earnings as the length of its line in this State bears to the whole length of its line; and similar statements shall be made by each oil pipe line company, and each sleeping car, parlor car, express or transportation company, telephone or telegraph or cable company, so that the proportion of the said gross earnings of the said companies, respectively, accruing, coming from their business within this State, may be accurately ascertained, or said statement may be made in any other mode satisfactory to and required by the State

Tax Commission. The said gross receipts taxes shall be due and payable at the treasury on or before the first day of July in each year.

"(c) Every partnership or individual engaged in any of the above enumerated branches of business in this State shall be subject to the tax imposed by this section and comply with all provisions relating thereto as if such firm or individual were a corporation."

THE CONSTITUTIONAL PROVISIONS INVOLVED

The Import-Export Clause of the Constitution of the United States (Art. I, Sec. 10, Clause 2) is as follows:

> No State shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

The Commerce Clause of the Constitution of the United States (Art. I, Sec. 8, Clause 3) is as follows:

> The Congress shall have Power * * *
> To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes.

STATEMENT OF THE CASE

Appellant is a Maryland corporation, engaged, as a common carrier of freight only, in operating a switching railroad, the lines of which lie wholly within Baltimore City and Baltimore County, in the State of Maryland (R. 17). It also operates a marine terminal in the port of Baltimore and its railroad lines run between said marine terminal and connections with trunk-line railroad carriers serving the port of Baltimore. While its operations are performed

solely within the State of Maryland, Appellant's business of handling, transporting and forwarding freight in transit falls into three classes, namely: (1) intrastate commerce, (2) interstate commerce and, (3) foreign commerce in the importing and exporting process.

The last-mentioned class of Appellant's business consists of receiving from vessels which dock at its marine terminal *imports*, such as ores, wood pulp and sugar, originally consigned from foreign countries to points in inland United States; and, while they are in continuous transit and in their unbroken original packages, Appellant, as the agent of the original consignors or the importer consignees of the goods, and at their request, handles these imports at once at its piers (i.e., weighs them, furnishes crane and wharf privileges, and brief temporary intransit storage), and, either delivers them to trucks at its piers to be carried forward to their original ultimate destinations, or transports them without delay over its railroad lines to points in Baltimore where its lines connect with the trunk line railroads, to which it delivers them to be carried to their original ultimate destinations. Appellant also, as the agent of the original consignors of the goods, receives *exports* from these connecting carriers, which exports have been originally consigned from inland points in the United States to points in foreign countries, and, as the connecting link in their overall transit, transports them to its marine terminal, where these exports are loaded without delay upon vessels bound for their foreign destinations. All of these services are necessary for the continuous transit of the imports and exports which was in contemplation when the goods were originally consigned.

In the year 1946, Appellant derived from all classes of its common carrier business in Maryland gross receipts in the total amount of $1,588,774.48 (R. 18). Of this total, $882,817.27 gross receipts were derived from its operations in intrastate and interstate commerce, and Appellant has not here challenged the Maryland statute in question inso-

far as it lays a "franchise tax" upon its privilege to engage in such intrastate and interstate operations and measures the amount of the tax by the $882,817.27 gross receipts derived therefrom.

But, of this total, $705,957.21 gross receipts were derived solely in return for Appellant's performance of the services of handling and forwarding imports and exports described above (R. 18, 20, 22, 23). And Appellant claims that its franchise or privilege to engage in the business of performing those services was not granted by the State and may not constitutionally be taxed by the State, and that its said gross receipts from such operations in the amount of $705,957.21 may not be included as the measure of the amount of such "franchise tax", and that the statute in question insofar as it purports to do so is unconstitutional.

(a) *Typical examples of Appellant's services performed in the importing and exporting process.*

Appellants services to imports and exports are of five types (R. 22):

(1) Switching, which is railroad transportation over Appellant's lines between Appellant's piers and its connections with connecting railroads;

(2) Storage, which is storing at Appellant's piers, in excess of free time for a few days only while awaiting forwarding instructions and delivery to connecting carriers, goods which have just arrived at the piers from foreign ports;

(3) Crane Privilege, which is the furnishing by the Appellant of a crane at its pier for stevedoring operations in unloading cargoes from vessels into railroad cars for the rest of the shipment immediately upon the arrival of the cargoes from foreign ports;

(4) Wharfage, which is the furnishing by the Appellant of the use of its piers to trucks and lighters which come on or to the piers to accept delivery of goods just arrived from foreign ports; and

(5) Weighing, which is the weighing by the Apellant by means other than cranes, of railroad cars which have been loaded with ore from the holds of vessels just arrived from foreign ports.

Vessels from foreign ports carrying goods originally consigned at point of shipment to various inland points in the United States arrive at Appellant's piers. It is necessary for the goods which are to go forward by rail to be unloaded at once from the vessels at the piers and there reloaded into freight cars, and these freight cars forwarded by Appellant over its lines to connecting carriers to be further transported by them to the original consignment destinations of the shipments. This transportation service by the Appellant is done at its regular tariff rates on file with the Interstate Commerce Commssion, and this service is known as Switching. Actual examples of this switching service, which are agreed to be typical of all of the switching, the operating revenues derived from which are claimed to be exempt, are set forth in the record.

The first example (R. 23-24) of this switching service is a consignment of bales of wood pulp from Sweden to Richmond, Virginia. The vessel docked at the Appellant's pier July 9, 1946. This wood pulp, in the unbroken bales, was forwarded in railroad freight cars toward its original destination over the lines of the Appellant three, four and six days after arrival. This service was performed by Appellant at the request of the original consignor.

The second example of switching (R. 25-26) is a consignment of Russian chrome ore in bulk from Russia to Kendaia, N. Y. The vessel docked at the Appellant's pier August 24, 1946, and this ore, still in bulk, was forwarded toward its original destination in railroad freight cars over the Appellant's lines within four days after the date of arrival. This service was performed by Appellant at the request of the importer.

The third example of switching (R. 26-27) is a consignment of manganese ore in bulk from Durban, South Africa,

to Etna, Pennsylvania. The vessel docked at the Appellant's pier August 7, 1946, and this ore, still in bulk, was forwarded toward its original destination in railroad freight cars over the Appellant's lines within seven days. This service was performed by Appellant at the request of the original consignor.

The fourth example of switching (R. 27) is a consignment of manganese ore from India to Johnstown, Pennsylvania, which the Appellant forwarded toward its original destination over its lines in bulk within four days after the date of arrival. This service was performed by Appellant at the request of the original consignor and importer.

Sometimes the foreign goods are stored by Appellant at its piers for a few days awaiting reshipment by trucks or awaiting instructions for forwarding by rail and, when this is done, Appellant makes a regular charge therefor for each day held in excess of a period of free storage, at rates prescribed by its tariff on file with the Interstate Commerce Commission. This service is known as Storage. The typical example of this service (R. 25), which is claimed to be exempt from taxation, is the storage by the Appellant for a period of less than eleven days of a quantity of sugar, still in its original packages or bags, which had been consigned from Cuba to various inland points in the United States via Appellant's piers. This sugar was stored by the Appellant only during the period that forwarding instructions to final destinations were awaited. This service was performed by Appellant at the request of the original consignor.

Sometimes the transfer of a foreign cargo, or some part of it, from the vessel to the railroad cars at Appellant's piers can be done by means of a crane and, when this is done, Appellant furnishes the crane and makes a regular charge therefor. This service is known as Crane Privilege. An example (R. 25-26) of this service which is typical of the crane service claimed to be exempt, is the crane service rendered by Appellant in the transfer of Russian chrome

ore from vessel to railroad cars which had been shipped from Russia to Kendaia, N.Y. Since this chrome ore was forwarded within four days after the arrival of the vessel at Appellant's pier, it is obvious that this crane service was performed almost immediately after the arrival of the vessel. This service was performed by Appellant at the request of the importer.

The second example of crane privilege (R. 26) is the transfer from vessel to railroad cars of South African manganese ore consigned from Durban, South Africa, to Etna, Pennsylvania. Again, since the cars were forwarded by Appellant within seven days after the arrival of the vessel, this crane service was performed almost immediately after the arrival of the vessel. This service was performed by Appellant at the request of the original consignor.

A third example (R. 27) is the transfer by crane from vessel to railroad cars of manganese ore which had been consigned from India to Johnstown, Pennsylvania, and forwarded within four days after the arrival of the vessel. This service was performed by Appellant at the request of the origina consignor and importer.

The last example of crane privilege (R. 27-28) is the use of the crane in transferring from vessel to lighters in the Baltimore harbor, sand ballast consigned from Europe to the United States War Shipping Administration, the unloading of the vessel into the lighters taking place on the very day of arrival of the vessel. This service was performed by Appellant at the request of the importer.

If some of the bulk cargo can not be transferred from the vessels to the railroad cars by means of a crane, which automatically weighs the freight, the Appellant weighs the railroad cars after they have been loaded from the vessel by other means and makes a regular charge therefor. This service is known as Weighing. The typical example of this service (R. 28) is the weighing by the Appellant of five cars of ore which had been shipped from Brazil and consigned

to the R.F.C. Office of Metals Reserve. The service was performed by Appellant within four days of arrival and at the request of the importer.

If the goods are unloaded from the vessel to the Appellant's piers and then delivered to trucks which come on the piers, or delivered directly to lighters alongside the vessel, for a continuation of the over-all transit, Appellant charges at its tariff rates for this use of its piers. This service is known as Wharfage. The typical examples of this wharfage service (R. 24) are the use of Appellant's pier by trucks in obtaining delivery for further transit of quantities of sugar, still in their original packages or bags, shipped from Cuba and consigned to various inland points in the United States, (the service being performed by Appellant at the request of the original consignor), and the use which was made by lighters in receiving alongside the vessel docked at Appellant's piers, for further shipment, sand ballast consigned from Europe to the United States War Shipping Administration (R. 27-28), the service being performed by Appellant at the request of the importer.

The preceding examples are of Appellant's services in the forwarding of *imports* from foreign countries to their original final destinations. The record contains also (R. 28-29) typical examples of switching or transportation services which Appellant performs in the forwarding of *exports*. The typical examples are shipments of black sheet steel, in the original packages or bundles, consigned on July 22, 1946, and August 1, 1946, respectively, from Vandergrift and Irvin, Pennsylvania, to Canton Docks, Baltimore, for export to South Africa, the original way bills issued at Vandergrift and Irvin, Pennsylvania, being so endorsed. Appellant, at the request of the agent of the original consignors, switched or transported these shipments from its connection with the Pennsylvania Railroad to the vessel at its pier bound for South Africa, which sailed August 7, 1946.

(b) *Maryland taxes to which Appellant is subject*

Even if Appellant should be successful on this appeal, it would still be subject to the "franchise tax" levied by the statute here assailed, insofar as that tax is imposed upon its privilege of engaging in intrastate and interstate commerce. Appellant is also subject to and pays an annual State franchise tax "for its franchise to be a corporation", imposed by a separate statute, Article 81, Section 144 of the Maryland Code (1947 Supp.). It also is subject to an annual State income tax upon net income over and above its railroad operating revenues less related expenses, imposed by Article 81, Sections 230, 233(m) of the Maryland Code (1947 Supp.). It also is subject to and pays substantial annual local ad valorem property taxes upon its operating properties to Baltimore County and Baltimore City, imposed by Article 81, Sections 6(5) and 13 of the Maryland Code (1947 Supp.). Its operating properties are exempted, by Article 81, Section 7(15) of the Maryland Code (1943 Supp.) from the comparatively small property taxes levied generally upon Maryland taxpayers *for State purposes only*.

Thus, if the "franchise tax" here challenged is, as the Court of Appeals characterized it, an "in lieu tax", it is "in lieu" only of a State tax *upon net income* derived from its importing and exporting activities and of that small ad valorem property tax which might otherwise be assessed *for State purposes only* upon the physical properties devoted to its importing and exporting activities (R. 21). The franchise tax measured by gross receipts is not "in lieu" of the heavy annual ad valorem property taxes assessed for local purposes which Appellant must pay in addition.

Except for its franchise right to be a corporation and to operate in corporate form, in return for which Appellant pays the State a separate annual franchise tax, Appellant receives from the State of Maryland no privilege or franchise whatever to operate, or to aid it to operate, in foreign commerce. Its railroad lines and other operating facilities

cross or occupy no State property, but lie exclusively upon Appellant's own private property, except to the extent that its railroad crosses four streets owned by the City of Baltimore,—and for this crossing privilege, derived not from the State, but from the City of Baltimore, Appellant separately compensates the City.

(c) *The proceedings below*

In 1947, pursuant to Art. 81, Sec. 96 of the Maryland Code (1939 Edition), Appellant reported to the State Tax Commission of Maryland (hereinafter referred to as "Commission") that Appellant's total gross receipts derived from its railroad business in the State of Maryland during the previous year 1946 amounted to $1,588,774.48, and duly claimed in its reports and in letters to the Commission, citing pertinent authorities, that of these total gross receipts $705,957.21 had been derived by Appellant from that class of its business constituting foreign commerce and the importing and exporting process described above, and that the same were constitutionally exempt and immune from taxation and could not be included as the measure of a State franchise or privilege tax sought to be imposed on such activities, and that no such State franchise or privilege tax could validly be imposed on the privilege of engaging in such activities, by reason of the provisions of Artcle 1, Section 10, Clause 2 of the Constitution of the United States (Import-Export Clause) (R. 18-19).

Notwithstanding said claim, the Commission in December, 1947, imposed upon Appellant, under Art. 81, Sec. 95 of the Maryland Code (1943 Supp.), a tentative assessment amounting to $1,588,774.48 and computed thereon a tentative franchise or privilege tax for the year 1947 amounting to $39,092.34 (R. 19).

Thereupon Appellant duly and timely applied to the Commission for a reduction of said tentative assessment in an amount equal to its gross receipts derived solely from

its operations in foreign commerce and the importing and exporting process, again claming that the tentative assessment, insofar as it included such gross receipts, and that a franchise or privilege tax measured by such gross receipts, would contravene the said Import-Export Clause of the Constitution of the United States (R. 19). This application for exemption of such gross receipts would, if recognized, have reduced the said assessment by $705,957.21, to an assessment of $882,817.27, and the said franchise or privilege tax by $17,648.34 to a tax of $21,440.00.

At a formal hearing on said application before the Commission, Appellant offered factual evidence supporting its application, including detailed evidence showing that that portion of the franchise or privilege tax for 1947, as calculated by the Commission, imposed upon its privilege to engage in foreign commerce and the importing and exporting process, was over ten times greater in amount than a non-discriminatory ad valorem property tax *for State purposes only* would be, if the assessed value of Appellant's properties utilized in its importing and exporting operations should be taxed at the same ad valorem rate applicable generally to the property of other taxpayers in the State (R. 21).

Following said hearing the Commission on March 24, 1948, passed an order that Appellant's gross receipts tax for the year 1947 as tentatively assessed was "constitutional" and its "protest is disallowed" and entered a final assessment against Appellant amounting to its total gross receipts, or $1,588,774.48, including gross receipts of $705,957.21 derived by Appellant solely from its operations in foreign commerce and the importing and exporting process (R. 29-30).

On April 19, 1948, Appellant duly and timely, pursuant to Art. 81, Sec. 194(b) of the Maryland Code (1947 Supp.), appealed from said order and final assessment to the Circuit Court No. 2 of Baltimore City, a state equity court of

first instance having statutory jurisdiction in the premises to review judicially said assessment and order of the Commission and correct the same for errors of law only. In its petition of appeal to said Court and at the trial of the issues of law therein, Appellant contended that the assessment appealed from, insofar as it included therein $705,957.21 gross receipts derived by Appellant solely from its operations in foreign commerce and the importing and exporting process, and that the franchise or privilege tax amounting to $17,648.34 which was imposed upon Appellant's privilege to engage in foreign commerce and the importing and exporting process, contravened Article 1, Section 10, Clause 2 of the Constitution of the United States (Import-Export Clause) (R. 30). Appellant prayed said Court to issue a decree holding and declaring that the provisions of Article 81, Sections 94½ and 95 of the Annotated Code of Maryland (1943 Supp.) were unconstitutional and invalid as applied to Appellant's privilege to engage in foreign commerce and the importing and exporting process and to its gross receipts derived solely therefrom.

On June 29, 1949, the Circuit Court No. 2 of Baltimore City, decided that the said statute was valid and not unconstitutional and entered its decree "that the decision of the State Tax Commission of Maryland to include in the measurement of the Petitioner's gross receipts tax for the year 1947 receipts derived from the transportation of goods consigned for importation or destined for exportation, be and the same is hereby sustained" (R. 31).

On June 30, 1949, Appellant duly and timely, pursuant to Art. 81, Sec. 194(b) of the Maryland Code (1947 Supp.), as amended by 1949 Laws of Maryland, Chapter 413, entered an appeal to the Court of Appeals of Maryland, which is the highest court in the State of Maryland in which a decision could be had, from the said decree of the Circuit Court No. 2 of Baltimore City dated June 29, 1949. On such appeal there was drawn in question by the Appellant the validity of the statute of the State of Maryland

(namely, Annotated Code of Maryland, 1943 Supplement, Article 81, Sections 94½ and 95), on the ground of its being repugnant to Article 1, Section 10, Clause 2 of the Constitution of the United States (Import-Export Clause). The record of the case in the Court of Appeals of Maryland consisted of a Statement of the Case prepared and signed by all the parties to the case with the approval of the lower court, as authorized by Rule 22 of the Court of Appeals of Maryland, showing how the questions in the case arose and were decided below. The decision and final decree in this case entered by the Court of Appeals of Maryland on April 19, 1950 (two judges dissenting), was in favor of the validity of said statute.

(d) *The decision of the Court of Appeals*

In analyzing the holdings of the Court of Appeals, as expressed in its opinion (R. 35-44), we start with the proposition that the Court impliedly found that the articles which Appellant handled and transported were, in fact and in law, imports and exports at the time they were so handled and forwarded. The Court said, "The operating revenues claimed by the appellants to be exempt were received for transportation, switching, storage, crane privileges, wharfage and weighing of coal, grain, ores and other miscellaneous commodities *in transit between foreign ports and points within the United States*" (R. 38); and the whole opinion proceeds on the assumption that this freight constituted imports and exports. There is the further underlying implication that, in the Court's opinion, Appellant's services in question,—necessary to the continued unbroken transportation of these imports and exports, were *part of the importing and exporting process.*

Again, there is the further holding that the whole tax, a separable part of which is here challenged, is a franchise tax imposed, not on the franchise or privilege to be a corporation or to operate in corporate form, but on, and in return

for, the franchise or privilege *to operate a railroad*, including the franchise or privilege to engage in the importing or exporting process. On this point the Court said (R. 38):

> "This Court in a long line of cases has sustained the statutory declaration, supra, that the tax here in question is a franchise tax in lieu of * * other State property taxes."

The Court then quoted with approval from *State v. Philadelphia, Wilmington and Baltimore Railroad Co.*, 45 Md. 361, 379, 381 that "the tax is not imposed upon the gross receipts * * * it is a tax upon the franchise upon railroad companies, measured by the extent of their business," it "is a tax upon the franchise of such companies, not upon their property" (R. 38).

It then distinguished this particular franchise tax from the separate and distinct tax on the franchise "to be a corporation", imposed by Maryland Code, Art. 81, Sec. 144, saying, "The franchise to operate a railroad is of course, different from the ordinary privileges conferred by a franchise to operate as a corporation" (R. 38-39).

Furthermore, in explaining the nature of the tax the Court of Appeals (R. 38) cited its former decision in *State v. Baltimore & Ohio Railroad Co.*, 48 Md. 49 (1878) which flatly holds that only those gross receipts which are derived from the exercise of the taxed franchise or privilege are to be included as the measure of the tax, a decision which negatives any possible construction of the statute that it imposes a tax only on the intrastate privilege though attempting to measure the same by total gross receipts including those from interstate and foreign commerce.

In spite of its conclusions, (1) that Appellant was engaged in the importing and exporting process and (2) that that portion of the tax here assailed is a franchise tax exacted for the privilege of engaging in that process, the Court of Appeals, nevertheless held the tax valid. It apparently arrived at this holding upon the following grounds:

(1) The Court of Appeals apparently thought that, because this franchise or privilege tax was levied in the place and stead of an ad valorem tax *for State purposes* upon the property of Appellant, it could not offend the Import-Export Clause and the Commerce Clause. Furthermore, the Court arrived at this conclusion, even though it recognized that such ad valorem property tax for State purposes, for which the franchise tax was substituted, if it were levied in a non-discriminatory fashion upon Appellant at the same rate applicable to other taxpayers, would be less in amount than one-tenth of the so-called "in lieu franchise tax".

To support these propositions the Court of Appeals relied (R. 39) upon *United States Express Co. v. Minnesota*, 223 U. S. 335 (1912); *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450 (1918); *Great Northern Railway Co. v. Minnesota*, 278 U. S. 503 (1929); *Illinois Central Railway Co. v. Minnesota*, 309 U. S. 157 (1940); *Maine v. Grand Trunk Railroad Co.*, 142 U. S. 217 (1891) and *Northwestern Life Insurance Co. v. Wisconsin*, 247 U. S. 132 (1918). It is submitted, however, that the Court misapprehended the effect of these decisions. It overlooked entirely that the Minnesota taxes which were upheld in the *United States Express Co.; Cudahy Packing Co., Great Northern Railway Co.* and *Illinois Central Railway Co.* cases, because they were imposed in lieu of state ad valorem taxes upon the property of those companies used in interstate commerce, *were themselves property taxes* upon gross receipts derived from such commerce and not franchise or privilege taxes upon the right to engage in such commerce. The Court overlooked the fact that the tax upheld in *Maine v. Grand Trunk Railroad Co.*, though it has been explained as an "in lieu tax" in *Galveston, Harrisburg and San Antonio Railroad Co. v. Texas*, 210 U. S. 217 (1908) imposed a franchise tax *solely upon the privilege of engaging in intrastate commerce* though apportioned gross receipts from interstate commerce were included in the measure of the tax. The *Maine* case has recently been explained on this ground in *Central Greyhound Lines v.*

Mealey, 334 U. S. 653, 658-9 (1948); *Interstate Pipe Line Co. v. Stone*, 337 U. S. 662, 680-1 (1949); and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422, 435 (1947). The Court also overlooked the fact that the franchise or license tax upheld in *Northwestern Life Insurance Co. v. Wisconsin* was not a franchise or license tax upon interstate commerce, because interstate insurance business at that time was legally not commerce in any sense under the then prevailing doctrine of *Paul v. Virginia*, 8 Wall. 168 (1868). (State license taxes upon the insurance business since *United States v. Southeastern Underwriters Ass'n*, 322 U. S. 533 (1944), depend upon express provisions of the McCarran Act. See *Prudential Ins. Co. v. Benjamin*, 328 U. S. 408 (1946); *Robertson v. California*, 328 U. S. 440 (1946)). Thus, the decisions which the Court of Appeals relied on to validate the Maryland franchise tax on the ground that it was imposed in lieu of property taxes, stand *only* for the proposition that state taxes imposed in lieu of ad valorem property taxes upon property used in interstate commerce are valid, provided (1) they are themselves property taxes upon gross receipts and not taxes for the privilege of engaging in interstate or foreign commerce, and (2) they yield no more than "a just equivalent" for ordinary property taxes.

(2) The Court of Appeals summarily brushed aside *Richfield Oil Corp. v. State Board of Equalization*, 329 U. S. 69 (1946), *Joseph v. Carter & Weekes Stevedoring Co.* 330 U. S. 422 (1947), *Almy v. California*, 65 U. S. 169 (1860), *Fairbank v. U. S.* 181 U. S. 283 (1901), *U. S. v. Hvostef* 237 U. S. 1 (1915) and *Thames & Mersey Insurance Company v. U. S.* 237 U. S. 19 (1915) as inapplicable to the Maryland tax on the privilege of handling and forwarding imports and exports in foreign commerce.

With regard to the *Richfield Oil Corp.* case, the Court simply said (R. 42,-43): "This sales tax was therefore a direct tax upon an export and violated the Import-Export

Clause. * * * The tax here before us is certainly not comparable under the Import-Export Clause to * * * a sales tax upon oil as in the *Richfield Oil Corp* case, supra." The supposed distinction was not further explained, and the strong point of resemblance between the tax held invalid in the *Richfield Oil Corp.* case and the tax assailed in the case at bar, namely, that both were privilege taxes upon the process of importing and exporting, went unnoticed.

With regard to *Joseph v. Carter & Weekes Stevedoring Co.*, the Court of Appeals made no attempt to distinguish the activities of stevedores of imports and exports from the activities of Appellant in handling and transporting imports and exports, but merely noticed that the majority opinion of this Court had held the New York occupation tax as applied to stevedoring invalid under the Commerce Clause, and that only Justices Douglas and Rutledge rested their concurrence upon the Import-Export Clause (R. 42-43).

The Court of Appeals made no mention of *Cook v. Pennsylvania*, 97 U. S. 566 (1878), but with regard to *Almy v. California*, *Fairbank v. U. S.*, *U. S. v. Hvoslef* and *Thames & Mersey Insurance Company v. U. S.*, supra, contented itself with saying (R. 40, 43):

> "The tax here in question is not a direct tax on imports or exports like that of a State stamp tax upon bills of lading for the export of gold and silver; or a federal stamp tax on an export bill of lading for wheat exported; * * * or a federal stamp tax on charter parties exclusively for the carriage of cargoes from State ports to foreign countries; or a tax applied against contracts of marine insurance which were held to be an integral part of exportation. * * *
>
> "The tax here before us is certainly not comparable under the Import-Export Clause to * * * a tax applied against a contract of marine insurance which is an integral part of exportation and so vitally connected therewith that a tax on the insurance policies is essentially a tax upon the export."

Here again, the supposed distinction between these invalid state and federal taxes and the Maryland franchise or privilege tax upon the importing and exporting process is not elucidated, except to the extent that the Court of Appeals seems to consider that these invalidated taxes were "direct taxes on imports or exports". They were certainly not property taxes, but every one of them was a tax sought to be imposed upon a privilege, and the Court of Appeals does not attempt to explain away this controlling feature of similarity between those invalid taxes and the tax questioned in the case at bar.

(3) The Court of Appeals also held that the Maryland franchise or privilege tax upon the importing and exporting process was not repugnant to the Commerce Clause. In so doing, the Court ignored the settled law, and the long line of decisions of which *Freeman v. Hewit*, 329 U. S. 249 (1946), is representative, that a State may not levy a tax in return for the privilege of engaging in interstate and foreign commerce. The Court of Appeals then proceeded to hold further (R. 43-44) that the Import-Export Clause should not "be given a more prohibitive effect" upon state taxes than the Commerce Clause. On this point the Court said (R. 44): "On principle, we see no reason why a franchise tax measured by gross receipts, including receipts from foreign commerce, should be valid under one clause (Commerce Clause) and not under the other (Import-Export Clause), particularly where the tax is in lieu of other permitted taxes." In making this last holding the Court of Appeals gave no effect whatever to the fact that the Import-Export Clause, by its terms, outlaws "any" State tax on imports or exports, except what may be absolutely necessary for executing a State's inspection laws, clear distinction between the Import-Export Clause on the one hand and the Commerce Clause on the other, a distinction which was emphasized by this Court in *Richfield Oil Corp. v. State Board of Equalization*, 329 U. S. 69 (1946).

SPECIFICATION OF ERRORS TO BE URGED

Appellant specifies as errors to be urged all of the errors set forth in its Assignment of Errors (R. 4-11), which may be more briefly stated as follows:

The Court of Appeals erred:

(1) In holding that the statute in question, insofar as it is applied to impose a franchise or privilege tax upon Appellant's privilege to engage in the business of handling and transporting imports and exports, and measures the amount thereof by the gross receipts derived from said commerce, is not repugnant to the Import-Export Clause and the Commerce Clause of the Constitution;

(2) In so holding, because the said franchise or privilege tax was imposed as a "in lieu franchise tax" in the place and stead of certain ad valorem property taxes for State purposes;

(3) In holding that, because the State might validly impose a non-discriminatory ad valorem property tax for state purposes upon the property of Appellant used in the importing and exporting process, it could constitutionally impose, in the place and stead thereof, a franchise or privilege tax upon Appellant's privilege of engaging in such process, and measure the tax by the gross receipts derived from Appellant's activities in such process;

(4) In so holding, although the amount of such substituted franchise tax is over ten times greater than a non-discriminatory ad valorem property tax for State purposes;

(5) In holding that the State might validly and constitutionally discriminate against Appellant, and against the foreign commerce in which it is engaged, by imposing, if it should choose to do so, a constitutionally valid ad valorem property tax for State purposes upon the property of Appellant employed in foreign commerce and in the importing and exporting process which would be over ten times

greater than the ad valorem property tax imposed for State purposes upon the property of other taxpayers; and that, on this erroneous premise, the State could validly and constitutionally impose, in the place and stead of such discriminatory property tax, a franchise or privilege tax of the same magnitude upon Appellant's privilege of engaging in the importing and exporting process;

(6) In holding that *United States Express Co. v. Minnesota*, 223 U. S. 335 (1912); *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450 (1918); *Great Northern Railway Co. v. Minnesota*, 278 U. S. 503 (1929); *Illinois Central Railway Co. v. Minnesota*, 309 U. S. 157 (1940); *Maine v. Grand Trunk Railroad Co.*, 142 U. S. 217 (1891) and *Northwestern Life Insurance Co. v. Wisconsin*, 247 U. S. 132 (1918) are authority for the proposition that a franchise tax upon the privilege of engaging in interstate commerce, measured by the gross receipts derived therefrom, may validly be imposed in lieu of, or as a substitute for, an ad valorem property tax upon the property used in such interstate commerce;

(7) In holding that "the tax here is question is not a direct tax on imports or exports like that of a State stamp tax upon bills of lading for the export of gold or silver; or a Federal stamp tax on an export bill of lading for wheat exported * * *; or a Federal stamp tax on charter parties exclusively for the carriage of cargoes from State ports to foreign countries; or a tax applied against contracts of marine insurance, which were held to be an integral part of exports";

(8) In holding that the State franchise tax in question "is certainly not comparable under the Import-Export Clause to" the stamp tax or excise laid upon the privilege of entering into a contract of insurance insuring a cargo of exports held invalid in *Thames and Mersey Insurance Company v. U. S.*, 237 U. S. 19 (1915), or the sales tax levied expressly "for the privilege of selling" exported

gasoline held invalid in *Richfield Oil Corp. v. State Board of Equalization*, 329 U. S. 69 (1946);

(9) In holding that the California state tax held invalid in *Richfield Oil Corp. v. State Board of Equalization*, 329 U. S. 69, as repugnant to the Import-Export Clause was "a direct tax upon an export", or more of a direct tax upon an export than the franchise tax here in question;

(10) In holding that the Import-Export Clause should not "be given a more prohibitive effect" upon State taxes than the Commerce Clause;

(11) In holding that there is "no reason why a franchise tax measured by gross receipts, including receipts from foreign commerce, should be valid under one clause (Commerce Clause) and not under the other (Import-Export Clause), particularly where the tax is in lieu of other permitted taxes".

SUMMARY OF ARGUMENT

I.

As a matter of Maryland law, that part of the gross receipts tax here assailed (i. e., that portion of the tax which is measured by the gross receipts derived by Appellant from the handling and transporting of imports and exports in foreign commerce) is not a property tax, either upon the franchise regarded as property, or upon the gross receipts themselves, or upon the physical properties of Appellant employed in the business. It is a franchise or privilege tax sought to be exacted by the State as a *quid pro quo* for the assumed granting by the State of a privilege. The whole gross receipts tax has been judicially determined to be a franchise or privilege tax exacted for the privilege of operating a railroad. See decision below and *State v. Philadelphia, Wilmington and Baltimore Railroad Co.*, 45 Md. 361 (1876). This franchise tax is laid

upon railroad operating partnerships and individuals as well as upon railroad corporations; therefore, the privilege for which this gross receipts tax is exacted is not the franchise or privilege to be a corporation or to operate in corporate form. That corporate privilege is separately taxed by a different statute.

But Appellant's privilege of operating a railroad is a bundle of separable privileges, namely (1) the privilege of operating in intrastate commerce; (2) the privilege of operating in interstate commerce; and (3) the privilege of operating in foreign commerce and in the importing and exporting process. And the whole gross receipts tax is likewise separable. That part of the tax which is measured by the intrastate gross receipts is laid on the privilege of operating in intrastate commerce. That part of the tax which is measured by the interstate gross receipts is laid on the privilege of operating in interstate commerce. That part of the tax which is measured by the gross receipts from foreign commerce and the handling and forwarding of imports and exports is laid on the privilege of operating in foreign commerce and of handling and transporting imports and exports. Thus, the whole tax, measured by the total gross receipts, and that part thereof here challenged, are not laid on the privilege of engaging in intrastate commerce or upon any other purely local or State conferred privilege.

The above interpretation of the Maryland statute follows from the holding of the Court of Appeals in the present case and from *State v. Baltimore & Ohio Railroad Co.*, 48 Md. 49 (1878), and also from the express wording of Section 94½ of Article 81 of the Maryland Code, which was added to the statute in 1943, in order to make the separability feature of the gross receipts tax, and the matching of the gross receipts derived from the taxed privilege against the privilege on which the tax is laid, abundantly clear.

Therefore, that portion of the gross receipts tax here claimed to be unconstitutional is, as a matter of State law, a State privilege tax exacted for Appellant's privilege of engaging in foreign commerce and in the importing and exporting process—a privilege which the State cannot grant or withhold.

II.

The gross receipts which Appellant claims to be exempt and constitutionally immune from use as the measure of that portion of the tax here challenged were derived by Appellant from its activities in the importing and exporting process. The freight coming from foreign countries which Appellant handled and forwarded were then clearly imports—see, *Hooven & Allison v. Evatt*, 324 U. S. 652 (1945). They were then in continuous unbroken transit, in accordance with their original consignments, from foreign ports to their intended ultimate destinations at points in the United States, and they were in their unbroken original packages. Likewise, the freight destined from points in this country to foreign ports which Appellant handled and forwarded were then clearly exports—see, *Coe v. Errol*, 116 U. S. 517 (1886).

Appellant's services to these imports and exports were performed without delay, before the importing and exporting process had ended, and were necessary and indispensable to the importing and exporting of this freight. They were performed at the request, and for the account, of the original consignors, consignees, importers and exporters. Accordingly, these services constituted foreign commerce and were part and parcel of the importing and exporting process.

Surely Appellant's activities with regard to these imports and exports were more clearly foreign commerce and more clearly part and parcel of the importing and exporting process that were: (1) the activities of a stevedore in

loading imports and exports—see, *Puget Sound Stevedoring Co. v. Commission*, 302 U. S. 90 (1937); *Joseph v Carter & Weekes Stevedoring Co.*, 330 U. S. 422 (1947); (2) the activities of an auctioneer in aiding in the sale of imports—see, *Cook v. Pennsylvania*, 97 U. S. 566 (1878); (3) the activities of an agent for a common carrier in issuing a railroad bill of lading covering exports—see, *Fairbank v. U. S.*, 181 U. S. 283 (1901); (4) the activities of an agent of a common carrier in issuing a water bill of lading covering exports—see *Almy v. California*, 24 How. (U. S.) 169 (1860); (5) the activities of a shipbroker in entering into a charter party for carrying exports—see *U. S. v. Hvoslef*, 237 U. S. 1 (1915); and (6) the activities of a marine insurance company in entering into a contract of marine insurance covering a cargo of exports—see *Thames & Mersey Insurance Co. v. U. S.*, 237 U. S. 19 (1915).

III.

If the propositions outlined in I and II of this Summary are sound, it would appear that, under the applicable and controlling decisions of this Court, that portion of the franchise tax here assailed clearly contravenes the Import-Export Clause of the Constitution. That clause in terms forbids "*any*" State tax upon imports and exports *with only one exception which is here inapplicable*. It has long been construed to forbid State taxes upon the process of importing and exporting, as well as upon the imports and exports themselves. See *Richfield Oil Corp. v. State Board of Equalization*, 329 U. S. 69 (1946) (selling privilege); *Crew-Levick Co. v. Pennsylvania*, 245 U. S. 292 (1917) (selling privilege); *Brown v. Maryland*, 12 Wheat. (U. S.) 419 (1827) (selling privilege); *Cook v. Pennsylvania*, 97 U. S. 566 (1878) (auctioneering privilege); *Almy v. California*, 24 How. (U. S.) 169 (1860) (privilege of issuing an export bill of lading). See also *Joseph v. Carter & Weeks Stevedoring Co.*, 330 U. S. 422 (1947) (Concurring Opinion-stevedoring privilege). *Puget Sound Stevedoring Co. v. Commis-*

sion, 302 U. S. 90 (1937) (stevedoring privilege). See also, under the Export Clause, *Fairbank v. United States*, 181 U. S. 283 (1901) (privilege of issuing a railroad bill of lading for exports); *United States v. Hvoslef* 237 U. S. 1 (1915) (privilege of entering into a charter party for exports); *Thames & Mersey Insurance Co. v. United States*, 237 U. S. 19 (1915) (privilege of entering into a contract of marine insurance on exports).

It is submitted that the fact that this franchise tax is an "in lieu tax", i.e. imposed in lieu of, or in the place and stead of, an ad valorem property tax upon Appellant's physical properties for State purposes only, does not save it. The prohibition against "any" tax includes the prohibition against any tax, in lieu or otherwise.

While perhaps less clearly so, in view of the contrariety of views expressed in *Interstate Pipe Line Co. v. Stone* 337 U. S. 662 (1949), this franchise tax upon the privilege of engaging in foreign commerce is, we submit, equally repugnant to the Commerce Clause. No valid argument can be made, in view of the statute and of the Maryland decisions construing it, that the sole incidence of this gross receipts tax is the privilege of engaging in intrastate commerce or any other local activity, and that the foreign commerce gross receipts merely measure part of the tax upon such local privileges. This statute will not bear the construction placed upon the Mississippi statute in *Memphis Gas Co. v. Stone*, 335 U. S. 80 (1948). It is completely unlike the tax in *International Harvester Co. v. Evatt* 329 U. S. 416 (1947). It is completely unlike the tax "laid for the privilege of using" the State's highways in *Aero Transit Co. v. Comm'rs*, 332 U. S. 495 (1947). The privilege which is the incidence of the separable tax here is the right to engage in foreign commerce. Such right is not granted by the State and cannot be withheld by the State. The burden of the tax on foreign commerce is direct and therefore invalid.

See *Freeman v. Hewit*, 329 U. S. 249 (1946); *Joseph v. Carter & Weeks Stevedoring Co.*, 330 U. S. 422 (1947);

Puget Sound Stevedoring Co. v. Commission, 302 U. S. 90 (1937); *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434 (1938); *Helson and Randolph v. Kentucky*, 279 U. S. 245 (1929); *Leloup v Mobile*, 127 U. S. 640 (1888); *Philadelphia & Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326 (1887); *Galveston, Harrisburg & San Antonio Railroad Co. v. Texas*, 210 U. S. 217 (1908); *Cooney v. Mountain States T. & T. Co.*, 294 U. S. 384 (1935); *Fisher's Blend Station v. Commission*, 297 U. S. 650 (1936).

And the fact that the tax is an "in lieu tax" will not save it from condemnation under the Commerce Clause either. The "in lieu tax" cases, namely, *United States Express Co. v. Minnesota*, 223 U. S. 335 (1912); *Cudahy Packing Co. v. Minnesota* 264 U. S. 450 (1918); *Great Northern Railway Co. v. Minnesota*, 278 U. S. 503 (1929); *Illinois Central Railroad Co. v. Minnesota*, 309 U. S. 157 (1940); *Maine v. Grand Trunk Railroad Co.*, 142 U. S. 217 (1881) and *Northwestern Life Insurance Co. v. Wisconsin*, 247 U. S. 132 (1918) are inapplicable for two reasons: (1) this is not a property tax upon gross receipts or a franchise tax upon a local State conferred privilege, as were the taxes in those cases, but a franchise tax upon the privilege of engaging in foreign commerce, and (2) the amount of this tax is not a "just equivalent" of, but is over ten times greater than, the ordinary ad valorem taxes, imposed, for State purposes only, upon other taxpayers.

ARGUMENT

I

As a Matter of State Law that Portion of the Tax Here Challenged is a Separable Tax Levied in Return for the Privilege of Engaging in Foreign Commerce and Importing and Exporting Process.

The present statute itself calls the tax (which is levied on corporations, partnerships and individuals alike) "a franchise tax * * * measured by the gross receipts", and this description has been in all the predecessor statutes since the

Acts of 1886, Chapter 120. This is more than a mere formal label. That it is a matter of substance appears from the Maryland decisions. They clearly show that the tax is not a property tax levied on a franchise as property, or on the gross receipts themselves, or on the property used in earning the gross receipts. The tax is held to be a tax imposed "in return" for privileges to operate a railroad.

For example, in *State v. P. W. & B. Railroad Co.*, 45 Md. 361 (1876), the Court of Appeals held that the original gross receipts tax law, Acts of 1872, Ch. 234, did not violate Article 15 of the Bill of Rights of the Maryland Constitution of 1867 relating to property taxes, because the statute did not impose a property tax but "a tax upon the *franchise* of railroad companies measured by the extent of their business." It also held that a franchise is "a special privilege conferred by the state on certain persons, and which does not belong to them of common right * * *". Later in the opinion the court speaks of "the franchise of a railroad company, namely, its right to maintain and operate its road and to receive fares for freight and passengers".

In *The Cumberland and Pennsylvania Railroad Co. v. State*, 92 Md. 668 (1901), the court held that the gross receipts tax imposed by the Acts of 1890, Ch. 559, and the Acts of 1896, Ch. 120, insofar as they related to gross receipts from operations in interstate commerce apportioned to those received from operations in the State of Maryland, did not violate the Commerce Clause. As to the nature of the gross receipts tax, the court in its opinion (page 677) speaks of such taxes as imposed "*in return* for franchises granted by them to corporations of their creation", and says (page 682) "Since the decision in *State v. P. W. & B. R. R.*, 45 Md., 397, it cannot be questioned that the tax in the present case is a franchise tax, measured in amount by the extent of the business of the corporation * * *", and that the Supreme Court of the United States "must, therefore, if called on to review this decision, assume that this tax is a franchise tax, and upon that assumption, determine its constitutionality".

In *State v. U. S. Fidelity and Guaranty Co.*, 93 Md. 314 (1901), the court speaks of the tax as "imposed on the corporation because of the value of its franchise, as distinguished from its ownership of property".

Again, in *State Tax Commission v. Western Maryland Railway Co.*, 52 A. 2d 615 (1947) the court said:

> "The tax therefore was not a tax upon the property of the corporations affected but was a franchise tax. *Cumberland & P. R. Co. v. State*, 92 Md. 668; *Postal Telegraph-Cable Co. v. Harford Co. Com'rs.*, 131 Md. 96."

Finally, in its opinion in the present case, the Court of Appeals adhered to the above explanation of the nature of the tax (R. 38).

The Court of Appeals in its opinion likewise made it clear that the gross receipts privilege tax is not imposed in return for the franchise to be a corporation or to operate in corporate form. It points out that the "franchise to be a corporation" is separately taxed by a separate statute, Md. Code (1947 Supp.) Art. 81 Sec. 144, and says:

> "The franchise to operate a railroad is of course different from the ordinary privilege conferred by franchise to operate as a corporation" (R. 38-39).

This conclusion would have followed anyway from the fact that the gross receipts franchise tax is imposed upon railroad operating partnerships and individuals as well as upon railroad corporations.

It should also be noted that foreign corporations as well as domestic corporations pay the State a separate annual fee for the privilege of exercising their corporate franchises in the State, imposed by Md. Code (1947 Supp.) Art. 81 Sec. 148. Md. Code (1939 Ed.) Art. 23, Sec. 120(d) requires foreign corporations to register in order to engage in interstate or foreign commerce within the State, but imposes no charge for such registration.

But, as above stated, the privilege to operate a railroad, in the case of Appellant, is a bundle of separable privileges, including (1) a privilege to operate a railroad in intrastate commerce (which is a privilege emanating from the State and which the State can tax); (2) a privilege to operate in interstate commerce, and (3) a privilege to operate in foreign commerce and in the importing and exporting process;—the latter two privileges not granted by the State. And since Appellant engages in all three classes of business, namely, intrastate commerce, interstate commerce and foreign commerce, the question at once arises whether the whole tax imposed by the statute is laid upon, or in return for, the mere intrastate privilege alone, although it is measured by the total gross receipts including those derived from operations in interstate and foreign commerce.

It is submitted that such is not a correct interpretation of the statute. On the contrary, it appears clear that the whole gross receipts tax is a separable one, a distinct portion thereof being laid for the privilege of engaging in intrastate commerce and measured by the separable gross receipts derived from the exercise of that privilege; another distinct portion being laid for the supposed privilege of engaging in interstate commerce, and measured by the separable gross receipts derived from interstate business carried on within the State; and *the third distinct portion being laid in return for the supposed privilege of engaging in foreign commerce and the importing-exporting process, and measured by the separable gross receipts derived therefrom.*

It will be noted from its opinion that the Court of Appeals did not attempt to uphold the tax in question on the ground that it was imposed in return for intrastate or local privileges alone, although measured in amount by the gross receipts from interstate and foreign commerce as well as those from intrastate commerce. On the contrary, the opinion proceeds upon the bold theory that the State may constitutionally tax the privilege of engaging in foreign

commerce and importing-exporting process because it could tax the property of Appellant used in such activity. Furthermore, the Court of Appeals could not, in view of the wording of the statute and of its earlier decisions, have taken the view that the tax was laid upon the intrastate privilege alone.

Section 94½ of Article 81 includes the following:

> "When any public service corporation is engaged in more than one class of business and one or more classes thereof is business not subject to the gross receipts tax or subject thereto at different rates, the operating revenues of the class or classes of business subject to such tax at different rates shall be reported separately and taxed at the rate or rates applicable to such class or classes of business. This section shall not be construed as implying that in the absence of this section, the requirements of Sections 95 to 100, inclusive, could properly be otherwise construed."

It makes no difference whether the Legislature by referring in the above statutory provision to "classes of business" had in mind classes of business such as intrastate commerce, interstate commerce and foreign commerce, or whether it intended some other classification. The important thing is that this statutory provision clearly negatives any idea that the total gross receipts of a public service corporation are to be taken as the measure of the tax, unless they all flow from the exercise of the particular privilege upon which the tax is laid. If such a company derives gross receipts from activities which are not taxed, they are to be excluded from the measure. Thus, the statute makes it plain that only those gross receipts which flow from the exercise of the privilege taxed are to be included in the measure of the tax. Applying that principle to the situation in the case at bar, it is clear that the gross receipts which Appellant earns from its operations in the importing and exporting process are not sought to be included in the

measure of a tax levied solely for the privilege of engaging in intrastate or local operations.

The same conclusion follows from the holding in *State v. Baltimore & Ohio Railroad Co.*, 48 Md. 49 (1878) which is adhered to by the Court of Appeals in the present case. In the *Baltimore & Ohio Railroad Company* case, the court held that only those gross receipts of the railroad were taxable which were derived from those occupations which the company engaged in pursuant to special franchises granted it by the State subsequent to the grant of its original charter. It specifically held (p. 72) that:

> "If the franchises are exempt, it would necessarily follow, that the gross receipts derived from the exercise of its franchises, are also exempt."

The court in that case further specifically held that the gross receipts which the B. & O. Railroad Company obtained from those of its operations which the State had not licensed constituted no part of the measure of the value of the privileges which the State had granted. The receipts from Baltimore & Ohio's warehousing operations (except those incidental to railroad operations) and from its summer hotel business—privileges not granted by the State, were held not to be includible in its taxable gross receipts. It would seem to follow directly from this decision that, if that portion of Appellant's gross receipts which is in issue in the case at bar was derived wholly from a franchise which the State of Maryland did not, and could not, grant, it must, as a matter of statutory construction, be excluded from the calculation of the *quid pro quo* for the intrastate privilege which the State could, and did, confer.

This Court will respect the interpretation which the highest court of Maryland has placed upon the State statute. See *Minnesota v. Probate Court*, 309 U. S. 270, 273 (1940); *Guaranty Trust Co. v. Blodgett*, 287 U. S. 509, 513 (1933); *Southern Gas Corp. v. Alabama*, 301 U. S. 148, 153 (1937). But it is submitted that, if this Court were

free itself to construe the Maryland gross receipts tax statute, it would independently arrive at the interpretation which we have contended for.

This Court has upheld certain State taxes as not repugnant to the Commerce Clause when clearly *levied solely upon the State-conferred intrastate privilege*, although measured to some extent by property, net income or receipts used in or attributable to interstate business. See *International Harvester Co. v. Evatt*, 329 U. S. 416 (1947); *Atlantic Lumber Co. v. Comm'r.*, 298 U. S. 553 (1936); *Matson Navigation Co. v. State Board of Equalization*, 297 U. S. 441 (1936); *American Manufacturing Co. v. St. Louis*, 250 U. S. 459 (1919); *Southern Gas Corp. v. Alabama*, 301 U. S. 148 (1937); *Maine v. Grand Trunk Railroad Co.*, 142 U. S. 217 (1891); *Memphis Gas Co. v. Stone*, 335 U. S. 80 (1948); *Aero Transit Co. v. Comm'rs*, 332 U. S. 495 (1947).

Because that portion of the Maryland gross receipts tax will not bear the interpretation which was placed on the taxes in the cases just cited, they are clearly inapplicable. Even if the Maryland statute in question could be given the same interpretation, the tax measured by the gross receipts from the importing-exporting process would contravene the Import-Export Clause and, even under the Commerce Clause, it should be noted that there are serious limitations upon the permissible extent of the measure of a tax imposed solely upon local privileges. See *Cooney v. Mountain States T. & T. Co.*, 294 U. S. 384 (1935) holding that a State statute may not increase the amount of the tax exacted for the intrastate privilege because of the interstate business done. In that case, Chief Justice Hughes for a unanimous court said (p. 393):

> "Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax;

and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business. *Sprout v. South Bend*, 277 U. S. 163, 171; *East Ohio Gas Co. v. Tax Commission*, 283 U. S. 465, 470."

See also *Air-Way Electric Appliance Corp v. Day*, 266 U. S. 71 (1924).

II

The Gross Receipts Which Measured that Separable Portion of the Tax Here Challenged Were Derived by Appellant Solely from Operations in Foreign Commerce and Importing and Exporting Process.

As heretofore stated (p. 15), the Court of Appeals accepted Appellant's contention that the freight which it handled and transported, thereby earning the gross receipts claimed to be exempt, were imports and exports at that time. The Court said (R. 38):

> "The operating revenues claimed by the appellants to be exempt were received for transportation, switching, storage, crane privileges, wharfage and weighing of coal, grain, ores and other miscellaneous commodities *in transit between foreign ports and points within the United States.*"

Indeed, in view of the stipulated facts (R. 23-22-29), there could be no other conclusion. The freight was actually in unbroken transit, in accordance with its original consignments. The freight was then under the domination of the consignors or consignees. The freight was in its unbroken original packages or condition.

The recent decision of this Court in *Hooven & Allison Co. v. Evatt*, 324 U. S. 652 (1945), is direct authority for the proposition that the goods which were shipped from foreign countries to inland destinations in the United States were imports throughout *their entire journey*, and while

they were being handled by Appellant. In that case, a manufacturer in Xenia, Ohio, contracted with foreign shippers for the purchase of hemp and other fibers. Pursuant to these contracts the goods in bales were shipped from places outside the United States, consigned to a broker for the manufacturer at an American port with directions on the bill of lading "Notify the Hooven & Allison Co.", the manufacturer. Title to the goods passed to the manufacturer at the American port, and the manufacturer then gave instructions to the broker for the reshipment of the goods from the port to Xenia, Ohio. It was held, in an opinion by Chief Justice Stone, that the manufacturer, since it was "the inducing and efficient cause of bringing the merchandise into this country, which is importation", was the importer, and that the goods continued to enjoy the status of imports until they arrived at Xenia, Ohio, and even after that time while they were stored in their unbroken original packages at the manufacturer's warehouse in Xenia, Ohio, awaiting their use in manufacturing operations. It followed that so long as these goods remained imports they were exempt from an *ad valorem* property tax of the State of Ohio by reason of the Import-Export Clause of the Constitution. It is abundantly clear from this case that all of the carriers, both land and water, which participated in the over-all transit of these goods from foreign countries to Xenia, Ohio, were engaged in the importing process.

This Court has also clearly announced the rule as to when goods intended for export to a foreign country actually take on the status of exports. In *Coe v. Errol*, 116 U. S. 517, 526 (1886), this Court said:

> "In regard to imports from foreign countries, it was settled in the case of *Brown v. Maryland*, 12 Wheat. 419, that the State cannot impose any tax or duty on such goods so long as they remain the property of the importer, and continue in the original form or packages in which they were imported * * *.

> "But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to *goods exported to a foreign country* or to another State. What we have already said, however, in relation to the products of a State intended for exportation to another State will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or *have started upon such transportation in a continuous route or journey.* We think this must be the true rule on the subject." (Italics supplied.)

Of the above quotation, from *Coe v. Errol* this Court said in *Empresa Siderurgica v. Merced Co.*, 337 U. S. 154, 156 (1949):

> "That test was fashioned to determine the validity under the Commerce Clause of a non-discriminatory State tax. But as we noted in *Richfield Oil Corp. v. State Board*, 329 U. S. 69, 79, it is equally applicable to cases arising * * * under Art. 1, Sec. 10, Cl. 2 (the Import-Export Clause)."

Unquestionably, if the gasoline held taxable in *Joy Oil Co. v. State Tax Commission*, 337 U. S. 286 (1949) had not been stored at Dearborn, Michigan, for fifteen months but only for a reasonable time awaiting transshipment to Canada, this Court would have held that the rail transportation of the gasoline to Dearborn, solely within the confines of Michigan, *and the storage at Dearborn* were part of foreign commerce and the exporting process. The Court held that by the initial land carriage "one step in the process of exportation had been taken", but that the status of the goods changed by reason of *the long storage period* at Dearborn.

In the *Empresa Siderurgica* case, supra, those portions of a cement plant located in California sold to a foreign purchaser for export which had not been actually delivered to the initial rail carrier for shipment to the California port, were held subject to a California property tax, but there was not even an attempt in that case to lay the state tax on that portion of the plant which had been delivered to the rail carrier, and had thereby entered the export process, and it is implicit in the decision that such a tax, if laid, would have constituted a tax on an export contrary to Article 1, Section 10, Clause 2 of the Constitution.

It follows, moreover, that Appellant's services in handling and forwarding these imports and exports were part and parcel of importing and exporting process; and nothing in the opinion of the Court of Appeals runs counter to that contention. The services were performed without delay. They were performed at the request of the original consignors or consignees. They were all necessary to the continued and originally intended transportation of the goods.

There can be no question but that these activities of Appellant constituted foreign commerce. Transportation is "commerce itself". *Fargo v. Michigan*, 121 U. S. 230 (1887); *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1 (1824). This is true, although Appellant's services were all performed within a single state. *The Daniel Ball*, 10 Wall. (U. S.) 557 (1870); *Foster v. Davenport*, 22 How. (U. S.) 244, 246 (1859); *Texas & New Orleans Railroad Co. v. Sabine Tram Co.*, 227 U. S. 111 (1913); *R. R. Commission v. Texas & Pacific Ry. Co.*, 229 U. S. 336 (1913); *Carson Petroleum Co. v. Vial*, 279 U. S. 95 (1929); *Brown v. Maryland*, 12 Wheat. (U. S.) 419 (1827); *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90 (1937); *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422 (1947). This is true, although the freight was moving by so-called "split" means of transportation, i. e. by vessels and then by trucks or railroad cars and vice versa. *U. S. v. Capitol Transit Co.*, 325 U. S. 357 (1945); *U. S. v. Yellow Cab Co.*, 332 U. S. 218,

228 (1947. This is true, notwithstanding re-shipments at Appellant's piers, the power of the owner of the freight to divert it, and the incidental delays which were occasioned solely by the rendition of Appellant's necessary services to the freight. "Temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement" do not change the character of the commerce. *Minnesota v. Blasius*, 290 U. S. 1, 9-10 (1933); *Kelley v. Rhoads*, 188 U. S. 1 (1903); *Champlain Co. v. Brattleboro*, 260 U. S. 366 (1922); *Hughes Bros. Co. v. Minnesota*, 272 U. S. 469, 476 (1926); *United States v. Erie R. R. Co.*, 280 U. S. 98 (1929).

Similarly, there can be no question but that, under the authorities, these activities of Appellant constituted a part of the importing and exporting process. Selling imports has not been held to be a part of the importing process. *Brown v. Maryland*, 12 Wheat. (U. S.) 419 (1827). Selling exports has been held to be part of the exporting process. *Richfield Oil Corp. v. State Board of Equalization*, 329 U. S. 69 (1946); *Crew-Levick Co. v. Pennsylvania*, 245 U. S. 292 (1917). The activities of an auctioneer in selling imports has been held to be part of the importing process. *Cook v. Pennsylvania*, 97 U. S. 566 (1878). Stevedoring imports and exports has been held to be part of the importing and exporting process. *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 432 (1947); *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90 (1937). (See explanation of the *Puget Sound Stevedoring Co.* case in *Freeman v. Hewit*, 329 U. S. 249, 267 Footnote (1946)). Issuing a railroad bill of lading for goods to be exported has been held to be part of the exporting process. *Fairbank v. United States*, 181 U. S. 283 (1901). Issuing a water bill of lading for freight then regarded as exports has been held to be part of the exporting process. *Almy v. California*, 24 How. (U. S.) 169 (1860). Entering into a charter party for the carriage of exports has been held to be a part of the export-

ing process, *United States v. Hvoslef*, 237 U. S. 1 (1915). Issuing a policy of marine insurance covering exports has been held to be a part of the exporting process, *Thames & Mersey Marine Insurance Co. v. United States*, 237 U. S. 19 (1915).

In view of the above authorities, it would be odd indeed to find that railroad transportation of imports and exports is not part of the importing and exporting process, and indeed such transportation has been held to be such in *Joy Oil Co. v. State Tax Commission*, 337 U. S. 286 (1949) in which this Court stated that by the initial land carriage "one step in the *process of exportation* had been taken". And the Attorney General of the United States, in a considered opinion, has arrived at the same conclusion. See 31 Op. Atty. Gen. (U. S.) 329 which is quoted in full in the Record (R. 32-35).

In the Court of Appeals, Appellees argued that the terms "exporting process" and "importing process", as used by this Court in condemning State taxes upon such processes, are "words of art" with special meaning. They argued that "the term 'process' is used as a word of art to mean those transactions, in the case of exports, which begin at dock side". They also implied that "importing process" means only those activities in relation to imports which take place before the goods arrive from abroad at the dock in this country. This very argument was expressly rejected by Chief Justice Marshall in *Brown v. Maryland*, 12 Wheat. (U. S.) 419 (1827). It is also refuted by the holdings in *Cook v. Pennsylvania*, 97 U. S. 566; *Fairbank v. United States*, 181 U. S. 283, and *Crew-Levick Co. v. Pennsylvania*, 245 U. S. 292. In the *Cook* case, the auctioneers' services in selling, within the State of Pennsylvania, imports still in their original packages were performed after the goods had left the dock side, but they were nevertheless held to be part of the importing process and immune from a State franchise or license tax upon the privilege of performing those services.

In the *Fairbank* case, the activities of the initial railroad carrier performed in Minnesota, i. e., entering into a contract of affreightment there by issuing a bill of lading, were held to be part of the exporting process.

In the *Crew-Levick Co.* case, the exporters activities were performed within the City of Philadelphia and not at or beyond the dock side, but they were nevertheless held immune from a State franchise or license tax sought to be imposed upon the privilege of engaging in such activities.

Appellees also stressed below that Appellant was "engaged solely in affording transportation and related services under instructions from others" and argued from this fact that Appellant's activities were not in the importing and exporting process. But, here again, this argument is refuted by *Cook v. Pennsylvania*, 97 U. S. 566, in which the auctioneer did not own the imports but performed his services solely "under instructions from others". It is refuted by *Fairbank v. United States*, 181 U. S. 283, and by *Almy v. California*, 24 How. (U. S.) 169, in which the carriers who issued the bills of lading acted not as owners of the freight, but "under instructions from others". And it is refuted by *United States v. Hvoslef*, 237 U. S. 1 (1915) and *Thames & Mersey Marine Insurance Co. v. U. S.*, 237 U. S. 19 (1915), in which the shipbrokers and the marine insurance company were not owners of the goods but performed their respective services "under instructions from others".

III.

That Separable Portion of the Gross Receipts Tax Here Challenged Contravenes the Import-Export Clause.

As an original proposition, it was long ago argued that the phrase "any Imposts or Duties on Imports or Exports" in the Import-Export Clause was intended to mean no more than property taxes on goods while they constitute imports or exports or, at the most, taxes in the nature of a tariff. The construction which Chief Justice Marshall in

Brown v. Maryland 12 Wheat. (U.S.) 419 (1827) put upon the provision was to the contrary, and this construction has been followed by this Court ever since. The phrase, of course, includes such property taxes and tariffs, but it has also a much broader meaning. The authorities to be discussed in this section of the brief conclusively show, we submit, that the prohibition extends to and covers State franchise and occupation taxes such as the portion of the Maryland Gross Receipts Tax under consideration. The clause gives "immunity to the process of exportation and to the transactions and documents embraced in that process". See *Willcuts v. Bunn*, 282 U. S. 216, 228 (1931).

Probably the fullest elucidation of the meaning of the Import-Export Clause and its applicability is provided by the opinion of this Court in *Richfield Oil Corp. v. State Board*, 329 U. S. 69 (1946). This opinion had the concurrence of seven justices of this Court and occasioned only one dissent.

In the *Richfield case*, a California statute levied a franchise or occupation tax on retailers, measured by gross receipts, "for the privilege of selling tangible personal property at retail". The California Supreme Court held that the tax was "an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales" and that the "taxable incident" was the passage of title to the goods. The taxing authorities of California, their action being approved and affirmed by the California Supreme Court, included the gross receipts from the following transaction in the measure of the occupation tax laid upon the Richfield Oil Corp.

Richfield Oil Corp. entered into a contract with the New Zealand government for the sale of oil, f. o. b. Los Angeles, delivery to be made into the vessel owned by the New Zealand government in the harbor of Los Angeles, the oil when so delivered to be consigned to the Naval Officer-in-Charge at Auckland, New Zealand. The Richfield Company carried the oil by its own pipe lines from its refinery in California

to storage tanks at the Los Angeles harbor and pumped it from the storage tanks into the vessel of the purchaser. Thus, no land or water common carrier was employed for any part of the transportation.

This Court held that the inclusion of the gross receipts from this sale in the measure of the franchise tax assessed against the Richfield Oil Corp. was unconstitutional, in violation of the Import-Export Clause. It held that the California Supreme Court had erred in holding: (1) that the incident which gave rise to the accrual of the tax, namely, the passage of title, occurred prior to the commencement of the exportation, and (2) that, assuming the tax to be valid under the Commerce Clause of the Constitution, it must be valid under the Import-Export Clause.

This Court, after noting the *concessum* of the State that the oil would have become an export when shipped from the refinery, if it had been there delivered to an inland carrier for export, and earlier decisions which established that proposition, decided that the oil became an export, and that the process of exportation began, no later than the time the oil was delivered into the purchaser's vessel.

This part of the *Richfield* decision is therefore direct authority that the bundles of sheet steel in the case at bar, as soon as they were delivered to the inland carrier for export to South Africa, became exports in the process of exportation, and were in that status while they were being handled and forwarded by Appellant. See also *Spaulding & Bros. v. Edwards*, 262 U. S. 66 (1923).

This Court in the *Richfield case* then held that when the "taxable incident" i. e. the passage of title by delivery of the oil into the vessel, occurred, the oil had become an export in the process of exportation. So in the case at bar the "taxable incident" was the rendition by Appellant of its forwarding services. When that occurred the bundles of sheet steel shipped from points in Pennsylvania to South Africa had become exports and were in the process of exportation.

In the *Richfield case* the argument was refuted that implied exceptions might be read into the prohibition of the Import-Export Clause, and that the immunity from state taxation which it conferred was no broader than that accorded to interstate and foreign commerce under the Commerce Clause. On this point this Court said (pp. 75, 76, 78):

> "The two constitutional provisions, while related, are not co-terminous. To be sure, a state tax has at times been held unconstiutional both under the Import-Export Clause and under the Commerce Clause. *Brown v. Maryland*, 12 Wheat. 49; *Crew-Levick Co. v. Pennsylvania*, 245 U. S. 292. But there are important differences between the two. The invalidity of one derives from the prohibition of taxation on the import or export; the validity of the other turns nowise on whether the article was, or had ever been, an import or export. * * * Moreover the Commerce Clause is cast, not in terms of a prohibition against taxes, but in terms of a power on the part of Congress to regulate commerce. * * *
>
> "It seems clear that we can not write any such qualifications (those under the Commerce Clause) into the Import-Export Clause. It prohibits every State from laying 'any' tax on imports or exports without the consent of Congress. Only one exception is created—'except what may be absolutely necessary for executing it's inspection Laws'. The fact of a single exception suggests that no other qualification of the absolute prohibition was intended. It would entail a substantial revision of the Import-Export Clause to substitute for the prohibition against 'any' tax a prohibition against 'any discriminatory' tax. * * * the limitations of one cannot be read into the other. * * *
>
> "We cannot, therefore, read the prohibition against 'any' tax on exports as containing an implied qualification.

It is submitted that this part of the decision in the

Richfield case, constitutes a complete answer to the holding of the Court of Appeals in the case at bar that the franchise or priviledge tax in question may be upheld as an "in lieu tax". *This Court flatly rejected the Commerce Clause technique in dealing with the more stringent prohibition of the Import-Export Clause.* Since, unlike the Commerce Clause, this constitutional provision prohibits "any" tax, it prohibits all taxes, in lieu or otherwise. The "in lieu" property tax cases under the Commerce Clause are inapplicable on this ground alone.

When the prohibition against taxing a certain object or transaction is a flat and unqualified one, the object or transaction may not be subjected to taxation indirectly, or in another guise. See *Frick v. Pennsylvania*, 268 U. S. 473, 494 (1925); *N. J. Realty Title Co. v. Div. of Tax Appeals*, 338 U. S. 665 (1950).

In the Richfield case, this Court then turned to the question of whether the particular California franchise or occupation tax, to the extent that it was measured by the gross receipts from this export sale, constituted an impost or duty within the meaning of the Import-Export Clause. It held that it did, saying (pp. 83, 84, 85):

> "It is argued, however, that the present tax is not an impost within the meaning of the Import-Export Clause. * * *
>
> "Appellee concedes that the prohibition of the Import-Export Clause would be violated if the goods were taxed as exports or because of their exportation, or if the process of exportation were itself taxed. We perceive, however, *no difference in substance between any tax so labeled ant the present tax.* * * * The incident which gave rise to the accrual of the tax was a step in the export process.
>
> "Moreover, *Brown v. Maryland, supra*, rejected an argument that while a state could not tax imports, it could tax the privilege of selling imports. * * *
>
> "The prohibition contained in the Import-Export Clause against taxation on exports clearly involves

more than a mere exemption from taxes laid specifically on the exported goods themselves." (Italics supplied.)

It will be noted that it could not be successfully argued in the *Richfield* case that the whole tax was really laid on Richfield's state licensed intra-state selling activities and that it was permissible to measure the value of that state-granted privilege by the proceeds of a transaction which the state could not license. No more can such an argument prevail in the case at bar.

The holding in the *Richfield* case followed naturally from the decision in *Crew-Levick Co. v. Pennsylvania*, 245 U. S. 292 (1917). There, a state statute impose an annual mercantile license tax equal to a percentage of gross receipts from the business. The taxpayer sold $47,000 worth of merchandise to purchasers within the state and $430,000 worth to purchasers in foreign countries. This Court held violative of the Import-Export Clause and the Commerce Clause that portion of the tax measured by the gross receipts from the exportation.

We have already demonstrated *supra*, that Appellant's activities in question were part and parcel of the import-export process and we have cited the case of *Puget Sound Stevedoring Co. v. Commission*, 302 U. S. 90 (1937) which held that a State occupation tax upon stevedoring could not be measured by the gross receipts derived from stevedoring activities which were in foreign commerce. That decision rested upon the Commerce Clause, the Import-Export Clause apparently not having been invoked. But it would seem to follow, from the explanation of the two clauses in *Richfield Oil Corp. v. State Board*, *supra*, that an attempt to measure the State tax upon the stevedoring occupation by gross receipts from stevedoring imports and exports would *a fortiori* offend the stricter and unqualified provision of the Constitution, the Import-Export Clause.

And the decision in the *Puget Sound Stevedoring Co.*

case has been explained and approved on that ground. See Rutledge, J., concurring in *Freeman v. Hewit*, 329 U. S. 249, 266 (1946).

Joseph v. Carter and Weekes Stevedoring Co., 330 U. S. 422 (1947), a case almost identical on its facts with *Puget Sound Stevedoring Co. v. State Board, supra*, was decided on the authority of that case. A New York occupation tax upon stevedoring measured by gross receipts from servicing ships wholly within the port of New York, which, however, moved in interstate and foreign commerce, was held invalid under the Commerce Clause. Here again, since the whole tax as measured by gross receipts from both interstate and foreign commerce was under attack and since five of the justices were willing to condemn the exaction under the Commerce Clause, there was no occasion for them to articulate a condemnation under the Import-Export Clause of only a smaller portion of the tax. The majority opinion was delivered by Mr. Justice Reed, with whom concurred the Chief Justice and Frankfurter, Jackson and Burton, J. J. In a separate opinion, two justices, Douglas and Rutledge, J. J., dissented from the condemnation of the tax under the Commerce Clause but, invoking the Import-Export Clause, concurred in the result in so far as it struck down that part of the tax measured by the gross receipts from stevedoring imports and exports.

When it is remembered that the attack on the tax was made on its constitutionality under the Commerce Clause, it is obvious that there is no significance in the failure of any of the majority expressly to join in this view. They had already held the tax bad as to interstate as well as foreign commerce. Every one of them was in the majority in the *Richfield Oil Co. case*. There is no such thing as import or export business which is not foreign commerce and while a State tax on the processes of importation and exportation may "survive the tests of validity under the Commerce Clause and fail to survive the Import-Export Clause", the reverse is not true. If such a tax is invalid

under the Commerce Clause, it is necessarily also invalid under the Import-Export Clause. Accordingly, if the case had come up soley under the Import-Export Clause, one would have expected the five justices who joined in the majority opinion to have joined with Mr. Justice Douglas and Mr. Justice Rutledge in condemning the tax as applied to foreign commerce under that clause. That would mean a seven to two decision. See Professor Powell's interpretation of the decision in "More Ado About Gross Receipts Taxes", 60 Harv. L. Rev. 744.

In *Cook v. Pennsylvania*, 97 U. S. 566 (1878), a Pennsylvania statute required auctioneers in Philadelphia to be licensed and imposed a duty to be paid by such auctioneers equal to a percentage of their gross receipts from auction sales of goods of foreign growth or manufacture. The State contended that "being a tax on him for the right and privilege to sell at auction, it is not a tax on the article sold but the amount of the sales made by him is made a measure of that privilege." This Court held, "It was, then, a tax on the privilege of selling foreign goods at auction", and that it was invalid under the Import-Export Clause and the Commerce Clause in so far as it was measured by gross receipts from auction sales of imported goods still in their original packages.

It will be noted that, for its decision in the *Richfield Oil Company* case, this Court cited and relied heavily upon *Fairbank v. U. S.*, 181 U. S. 283 (1901); *U. S. v. Hvoslef*, 237 U. S. 1 (1915), and *Thames & Mersey Insurance Co. v. U. S.*, 237 U. S. 19 (1915). These three cases are all decisions striking down federal taxes because violative of the Export Clause of the Constitution of the United States (Art. I, Sec. 9, Clause 5), which is a limitation upon the Federal Government and which provides:

> "No Tax or Duty shall be laid on Articles exported from any State."

These cases are, however, directly in point here, because

the meanings of the Export Clause and the Import-Export Clause "as to the act which is prohibited" are the same. See *Brown v. Maryland*, 12 Wheat. 419, 445.

A stamp tax on a bill of lading is an excise for the privilege of entering into a contract of affreightment with a common carrier. The same is true of a stamp tax upon a charter party, since a charter party (other than a lease of the vessel) is a contract of affreightment for the whole cargo. A stamp tax upon a marine insurance policy insuring a cargo is an excise for the privilege of entering into the contract of insurance. In *Thomas v. U. S.*, 192 U. S. 363, 370 (1904), the words duties, imports and excises as used in the Constitution are defined "to cover customs and excise duties imposed on importation, consumption, privileges, particular business transactions, vocations, occupations and the like". One would suppose that, if excises such as these are imposts or duties upon imports or exports, when the goods carried or insured, as the case may be, are imports or exports, then *a fortiori* a privilege tax (as in the case at bar) upon the privilege of engaging in the occupation of carrying and handling imports and exports is an impost or duty upon the imports or exports. Appellant's gross receipts in question here are the proceeds of its contracts of affreightment for imports and exports. A tax on the privilege of carrying goods is certainly as direct a burden upon the goods themselves as is the tax upon a privilege to enter into a contract to do so (i.e., a bill of lading or charter party), and is even more direct a burden upon the goods than is a tax upon the privilege of insuring the goods in transit.

Yet a stamp tax upon a foreign bill of lading, upon a charter party and upon a contract of marine insurance, where the goods carried were exports, have been held to be taxes or duties upon the "Articles exported". See *Fairbank v. U. S.*, 181 U. S. 283 (1901); *U. S. v. Hvoslef*, 237 U. S. 1 (1915), and *Thames & Mersey Insurance Co. v. U. S.*, 237 U. S. 19 (1915).

On the authority of these cases, Attorney General Gregory in a formal opinion dated March 12, 1918, 31 Op. Atty. Gen. 29, ruled that a federal tax upon freight (i.e., the compensation for railroad carriage) where the articles are in the course of exportation would violate the Export Clause of the Constitution. For the convenience of the court, this opinion of Attorney General Gregory is set forth in full in the Record (R. 32 35).

In *Fairbank v. U. S.*, 181 U. S. 283 (1901), goods were shipped from Minnesota to Liverpool, England. The agent of the initial railroad carrier in Minnesota was convicted for failing to affix to the export bill of lading issued by him an internal revenue stamp as required by the War Revenue Act of 1898. The tax was laid upon the railroad company. The Supreme Court reversed the conviction, holding that this tax upon the railroad's contract of carriage was violative of the Export Clause.

In so holding the Court did not identify the bill of lading with the goods themselves (as goods in transit are now for some commercial purposes identified with an order bill of lading). The statute applied to straight bills of lading and therefore the decision cannot be explained upon that ground. The Court (p. 293) said:

> "If all exports must be free from national tax or duty, such freedom requires, not simply an omission of the tax on the articles exported, but also a freedom from any tax which directly burdens the exportation; and, as we have shown, a stamp tax on a bill of lading, which evidences the export is just as clearly a burden on the exportation as a direct tax on the article mentioned in the bill of lading as the subject of the export."

In *U. S. v. Hvoslef*, 237 U. S. 1 (1915), a firm of ship brokers having paid, in obedience to the War Revenue Act of 1898, stamp taxes on charter parties, entered into exclusively for the carriage of cargoes from ports in the United States to foreign ports, instituted an action for a re-

fund of tax. The Supreme Court affirmed the judgment for the taxpayers and held that such a charter party was "a mere contract of affreightment". After approving the decision in the Fairbank case, the Supreme Court said, "in legal principle, there can be no distinction which can condemn the tax in the one case and save it in the other". It added that "a tax on these charter parties was in substance a tax on the exportation; and a tax on the exportation is tax on the exports".

In *Thames & Mersey Insurance Company v. U. S.*, 237 U. S. 19 (1915), the Appellant was engaged in the business of underwriting policies of marine insurance, and it brought an action to recover the amounts paid by it as stamp taxes on policies which it had issued insuring certain exports against marine risks. The taxes were imposed upon the insurance company under the War Revenue Act of 1898. The Court held that these taxes could not constitutionally be imposed in view of the Export Clause. The Court posed the question "Is the tax upon such policies so directly and closely related to the 'process of exporting' that the tax is in substance a tax upon the exportation and hence within the Constitutional prohibition?" Answering this question in the affirmative, the Court said (pp. 26, 27):

> "It cannot be doubted that insurance during the voyage is by virtue of the demands of commerce an integral part of the exportation; the business of the world is conducted upon this basis. * * * proper insurance during the voyage is one of the necessities of exportation. The rise in rates for insurance as immediately affects exporting *as an increase in freight rates*, and the taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves." (Italics supplied.)

See also:

Almy v. California, 24 How. (U. S.) 169 (1860), a de-

cision announced by Chief Justice Taney that a state tax upon a bill of lading issued for articles which were at that time regarded as exports would be violative of the Import-Export Clause.

New York and Cuba Mail S. S. Co. v. U. S., 125 Fed. 320 (1903), holding that a federal stamp tax on manifests for clearance of the cargo of any ship for a foreign port violates the Export Clause. This decision was reversed on other grounds, 200 U. S. 488, but the holding of the lower court that the tax was unconstitutional was expressly approved in *U. S. v. Hvoslef, supra.*

See also:

Willcuts v. Bunn, 282 U. S. 216, 228 (1931).

In the court below, the State Tax Commission relied upon *Inter-Island Steam Navigation Co. v. Hawaii*, 96 F. 2d 412 (1938, C.C.A. 9th), affirmed 305 U. S. 306. But the case is readily distinguishable. There, under a statute of the Territory of Hawaii, a public utilities commission was empowered to investigate public utilities of the territory and each public utility subject to investigation was required to pay the commission an annual "fee which shall be equal to 1/20th of 1% of the gross income" of the utility "for the payment of all salaries, wages and expenses" incurred by the commission in making the investigations. The Inter-Island Company resisted the exaction in so far as it applied to that part of its gross receipts from transporting goods in interstate commerce. It is by no means clear that the Company was engaged in handling and transporting imports and exports. The Court held that the fee did not contravene the Import-Export Clause. It will be seen at once, however, that this fee falls directly within the one exception contained in the Import-Export Clause, namely, "except what may be absolutely necessary for executing its inspection Laws". Furthermore, since the fees were no more than sufficient to cover the expenses of the inspection, there was no "net Produce" to be turned over to "the Treasury of the United States".

In *New York v. Roberts*, 171 U. S. 658 (1898), the tax upheld was a franchise tax "upon the franchise of doing business *as a corporation*", the measure or basis of the tax being the amount of capital stock employed in the state. The company did a local intrastate business there as well as engaged in interstate and foreign commerce, but part of its capital stock in the state was invested in imports. The tax was construed to be a tax levied, not upon the privilege of importing and exporting or upon the doing of that business, but *solely upon the privilege to engage in local activities*. Furthermore, the tax was measured by the company's entire property in the state and not by gross receipts derived by selling imports and exports. See the explanation of the *Roberts* case in *Anglo-Chilean Corp. v. Alabama*, 288 U. S. 218, 227-8 (1933). In the latter case, a state tax, construed to be laid upon the actual doing of an importing business was held invalid under the Import-Export Clause and also under the Commerce Clause.

Cases sustaining ad valorem property taxes upon physical property used in the importing business are also beside the point. The same may be said of cases like *New York ex rel Burke, Ltd. v. Wells*, 208 U. S. 14 (1908), upholding a state property tax upon the proceeds of imports sold, which proceeds the importer had not remitted at once to the exporter but had mingled with his other working capital—an illustration of a broken original package.

Likewise, cases like *Peck & Co. v. Lowe*, 247 U. S. 165 (1918), and *National Paper & Type Co. v. Bowers*, 266 U. S. 373 (1924), are beside the point. They upheld income taxes *upon net income* derived from gross income, which in turn had been derived in part from the sale of imports and exports, for the obvious reason that the thing taxed "is as far removed from exportation as are articles intended for export before exportation begins".

IV.

That Separable Portion of the Gross Receipts Tax Here Challenged Contravenes the Commerce Clause.

For reasons of policy, Appellant in this case has not assailed the statute, in so far as it imposes a tax upon its privilege of operating a railroad in interstate commerce and measures that tax by its interstate gross receipts.

It does, however, have the Commerce Clause as the second string to its bow in its attack upon that portion of the tax which it does challenge.

It will be remembered that *Brown v. Maryland*, 12 Wheat. (U. S.) 419 (1927); *Crew-Levick Co. v. Pennsylvania*, 245 U. S. 292 (1917) and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422 (1947) are authorities for the proposition that a tax such as the one in question here is bad under the Commerce Clause as well as under the Import-Export Clause. See also *Anglo-Chilean Corp. v. Alabama*, 288 U. S. 218 (1933).

If we have clearly interpreted the Maryland Statute, as a matter of State law, to levy a separable tax for the privilege of engaging in foreign commerce, then it follows that the tax conflicts with the Commerce Clause, unless a whole line of decisions of this Court is now to be overruled. As recently as 1944 this Court said in *Spector Motor Service v. McLaughlin*, 323 U. S. 101, 103:

> "If Connecticut in fact sought to tax the right to engage in interstate commerce, a long course of constitutional history and 'an unbroken line of decisions' would indeed be brought into question."

A partial list of the cases that flatly hold that a privilege tax may not be exacted in return for such a privilege are:

Joseph v. Carter & Weekes Stevedoring Co., 330 U. S. 422 (1947); *Puget Sound Stevedoring Co. v. Commission*, 302 U. S. 90 (1937); *Gwin, White & Prince, Inc. v. Henne-*

ford, 305 U. S. 434 (1938); *Fisher's Blend Station v. Commission*, 297 U. S. 650 (1936); *Cooney v. Mountain States T. & T. Co.*, 294 U. S. 384 (1935); *Strout v. South Bend*, 277 U. S. 163 (1928); *Helsen & Randolph v. Kentucky*, 279 U. S. 245 (1929); *Lelong v. Mobile*, 127 U. S. 640 (1888); *Ozark Pipe Line v. Monier*, 266 U. S. 555 (1925); *Alpha Portland Cement Co. v. Massachusetts*, 268 U. S. 203 (1925).

See also *Freeman v. Hewit*, 329 U. S. 249 (1946).

Indeed, we might offer as our brief on this point the opinion of Mr. Justice Reed, which had the concurrence of the Chief Justices Mr. Justice Frankfurter and Mr. Justice Jackson, in *Interstate Oil Pipe Line v. Stone*, 337 U. S. 662 (1949). The decision in that case could not be cited against us because the tax was upheld only because Mr. Justice Burton took the view that the privilege there taxed was to engage in intrastate commerce.

Central Greyhound Lines v. Mealey, 334 U. S. 655 (1948) could not be cited against us, because clearly the tax there sustained was a property tax upon the apportioned gross receipts themselves and not a tax upon the privilege of engaging in interstate commerce. See 334 U. S. at pp. 654, 662-663, and in the dissenting opinion, pp. 664, 669 and the explanation which was made of the nature of the tax in the *Central Greyhound Lines* case, in *Memphis Gas Co. v. Stone*, 335 U. S. 80 at page 97 and in *Interstate Oil Pipe Line v. Stone*, 337 U. S. 662 at pp. 666, 667, 679-680-681.

Memphis Gas Co. v. Stone could not be cited against us, because the tax there sustained was not levied upon the privilege of engaging in interstate commerce, but for the protection of "local activities in maintenance, keeping in repair, and otherwise in manning" the pipe line within Mississippi. *Maine v. Grand Trunk Railway*, 142 U. S. 217 (1891) could not be cited against us, because the tax there upheld was levied solely upon the intrastate privilege. The tax in the *Maine* case has been explained to be such in *Central Greyhound Lines v. Mealey*, 653, 658-9 (1948); *Interstate Oil Pipe Line v. Stone*, 337 U. S. 662, 680-1 (1949)

and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422, 435 (1947).

The principal reasons advanced for regarding the Commerce Clause as a prohibition against a tax laid on the privilege in engaging in interstate and foreign commerce are, (1) such a tax is a direct burden on such commerce, and (2) the tax is exacted for a privilege or right which the State cannot grant or withhold.

The second reason for the rule is strikingly applicable to this case. Appellant enjoys protection of its property, and it pays heavy local taxes for that protection. It enjoys from the State a franchise to be a corporation, and it pays the State an annual tax for that privilege under the provisions of Md. Code (1947 Supp.), Art. 81, Sec. 144. It enjoys a franchise from the State to operate its railroad in *intrastate commerce*, and it does not resist that separable portion of the Gross Receipts Tax statute which taxes that local privilege and measures the tax by the gross receipts from the exercise of that local privilege. It receives nothing else from the State for which the State can ask additional return. It does not even use the highways of the State, or any other State property, and so could not be assessed a tax for that privilege, such as was involved in *Aero Transit Co. v. Comm'rs.*, 332 U. S. 495 (1947).

"To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States * * *." *Crutcher v. Kentucky*, 141 U. S. 47, 57 (1891).

In *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 260 (1911) it was said, "At this late day it is not necessary to cite cases to show that the right to engage in interstate commerce is not the gift of a state * * *." And see, *Adams Express Co. v. New York*, 232 U. S. 14 (1914); *Sault Ste. Marie v. International Transfer Co.*, 234 U. S. 333 (1914); *Buck v. Kuykendall*, 267 U. S. 307 (1925); *Bush*

& Sons Co., v. Maloy, 267 U. S. 317 (1925); *Mayor of Vidalia v. McNeely*, 274 U. S. 676 (1927).

The tax here assailed bears no "fiscal relation to protection, opportunities and benefits given by the state." It fails to meet the requirement that "the state has given anything for which it can ask return." Compare *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444 (1940).

Furthermore, a franchise tax upon the privilege of operating in foreign commerce cannot be upheld, even though, as here, it is imposed in the place and stead of relatively small ad valorem property taxes *for state purposes. United States Express Co. v. Minnesota*, 223 U. S. 335 (1912); *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450 (1918); *Great Northern Railway Co. v. Minnesota*, 278 U. S. 503 (1929); and *Illinois Central Railway Co. v. Minnesota*, 309 U. S. 157 (1940) have no application, because those "in lieu" taxes were property taxes upon the gross receipts themselves. As before stated, *Maine v. Grand Trunk Railway Co.*, 142 U. S. 217 (1891) has no application, even if regarded as a "in lieu" tax case, because the tax there was a franchise tax imposed solely upon the privilege of engaging in intrastate commerce.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals of Maryland should be reversed.

JOHN HENRY LEWIN,

VENABLE, BAETJER AND HOWARD,

Attorneys for Appellant.